

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

NEWARK COALITION FOR LOW	:	Civ. No. 89-1303(DRD)
INCOME HOUSING, et. al	:	
	:	
	:	
Plaintiffs,	:	
	:	
v.	:	
	:	
NEWARK REDEVELOPMENT AND	:	
HOUSING AUTHORITY, and	:	
ALPHONSO JACKSON, Secretary	:	
Of Housing and Urban Development :	:	
	:	
Defendants,	:	

PLAINTIFF'S BRIEF IN SUPPORT OF MOTION FOR FURTHER RELIEF
TO ENFORCE COURT ORDERS AND DECREES

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POINT I

THE NHA IS IN CONTEMPT OF COURT FOR IGNORING THE COURT'S ORDER OF JANUARY 21, 2005, TO REPLACE THE 42 UNITS AT MT. PLEASANT ESTATES, NJ2-51, THAT ARE BEING SOLD INTO HOMEOWNERSHIP. THIS COURT SHOULD ORDER THE NHA TO DEVELOP A PLAN TO CONSTRUCT THE 42 UNITS. FURTHER, THIS COURT SHOULD AWARD COSTS AND ATTORNEY FEES FOR LITIGATING THIS ISSUE.

FACTS

In October 2000, the NHA entered a home ownership plan for the Mt. Pleasant Estates, NJ2-51, to sell 42 housing units into private homeownership. ~~NHD approved the Homeownership Plan on February 8, 2001,~~ (Opinion of the Court, dated January 21, 2005, p.3).

The NHA rehabilitated this project as part of the 1777 units to be constructed under the Settlement Agreement, and reported to the Court and to the parties that it was a completed project. (See Opinion of the Court, dated January 21, 2005, p. 3).

~~SUD and the NHA did not obtain the permission of the Court to sell NJ2-51 into homeownership.~~

Plaintiffs objected to the plan, and the matter was litigated. On January 21, 2005, this Court:

ORDERED AND DECLARED, that the 42 housing units at the Mt. Pleasant Estates housing project ~~do not qualify and shall not be counted as part of the 1777 replacement units the NHA is required to construct pursuant to the 1989 Settlement Agreement, as amended.~~ (Ex. 17) (emphasis added)

The Court's opinion concluded:

The holding that the 42 Mt. Pleasant Estate Units do not qualify as replacement housing under the Settlement Agreement as amended requires that NHA construct 42 additional units that will qualify under the Agreement. (Opinion, dated January 21, 2005, p. 9)

On March 21, 2005, HUD filed a notice of appeal from this Court's order of January 21, 2005, and on June 7, 2005, HUD dismissed the appeal.

Since the termination of this litigation, the NHA, to counsel's knowledge, has taken no meaningful steps to implement the Court order. Beyond that the NHA has changed its construction reports to list only 1735 units to be constructed, instead of the 1777 units that have been repeatedly ordered as part of the settlement agreements. (See e.g. Exhibits 14,16, 25) The Court mentioned this in court twice, but the NHA has continued to ignore it, and to continue to list only 1735 units as the units to be constructed. In the last construction report, dated October 16, 2006, (Ex. 25) the NHA Executive Director stated his "understanding that a total of 144 units must be completed to satisfy this benchmark." (of 1777) This includes 2-49, and 2-53, but does not include the

replacement of 42 units of Mt. Pleasant Estates. The total remaining incomplete units is 186.

Plaintiffs therefore request that this Court:

1. hold the NHA in contempt of court for failing to comply with the Court order of January 21, 2005;
2. order the NHA to develop a plan to construct 42 replacement units;
3. order that the NHA revise its construction reports to reflect that 1777 units of housing must be built to comply with the settlement agreement.
4. order an award of attorney fees and costs for litigating this issue.

The Urgent Need for Relief by this Court

Urgent relief is needed from this Court. The NHA has totally ignored the Court's Order of January 21, 2005 for almost two years. Further, with the passage of time, the Total Cost Development Guidelines - the costs of construction - increases, thereby making it more difficult to construct housing. See e.g. Point IV infra.

POINT II

~~THE NHA HAS FAILED TO RENT AND TURNAROUND VACANT UNITS EXPEDITIOUSLY IN VIOLATION OF APPLICABLE HUD GUIDELINES OF 34. THIS COURT SHOULD ORDER RELIEF BASED ON THE REPORT OF ABT ASSOCIATES DATED FEBRUARY 24 2006 SO THAT THE NHA DOES NOT LOSE FUNDING WHICH WILL PREVENT IT FROM OPERATING ITS PROJECTS AND RENTING VACANCIES.~~

The report to the Court of Mary Ann Russ of Abt Associates, dated February 24, 2006,¹ reveals a worsening of NHA vacancies and turnaround time, and a failure of NHA management both in the management of conditions at certain projects, and in the leasing and occupancy department. This situation threatens the future funding of the NHA, and its consequent ability to provide low income housing.

A. Public Housing - Introduction

Ms. Russ correctly notes that one of the reasons the Plaintiffs sued the NHA "was the number of long-term vacant public housing units in a city where the demand and need for such housing was high. Now . . . the need and demand are unabated." The Plaintiff's original complaint and fourth cause of action alleged systematic mismanagement of the public housing program in Newark and specifically referred to the presence of massive vacancies and the failure to fill and turnaround vacant units. Complaint Paras. 61-65. Indeed, the 1999 settlement agreement (SA) compels the NHA to "cure" the administrative and management deficiencies ABT identified, including identified vacancy and turnaround problems. 1999 SA at Para. 2.

¹ . Report of Abt Associates from Mary Ann Russ and Victoria Main to the Court, dated February 24, 2006 (hereafter, the Russ Report) (Ex. 28).

Over the years the Court has been monitoring the NHA's vacancy rate, and seeking to improve the vacancy rate and turnaround times of vacant units to acceptable levels, through a variety of orders based on the reports and recommendations of Mary Ann Russ of Abt Associates under the 1999 Settlement Agreement. After a period of some considerable progress, in April 2005 Ms Russ documented "a very troubling trend" of backsliding in vacancy rates, vacancy turnaround times, and in the number of units vacant for more than one year. ABT report, 4/11/05 p.2 (Ex.26) Rather than moving forward towards the "cure" for these deficiencies mandated by the 1999 settlement agreement, Ms. Russ warned that "the NHA could slip back into the vacancy problems that plagued it in the past." Id. Viewing these and other identified management problems documented in the report, this Court pointed out that Ms Russ's report "discloses what I consider to be a crisis situation at the housing authority." Court notice dated 4/14/05. (Ex.27).

Unfortunately, Ms Russ's fears about the troubling backsliding in vacancy rates and turnaround time has been realized and this aspect of the "crisis" situation at the NHA identified by the Court has only worsened.

B. Ms. Russ's report, dated February 24, 2006, contains serious findings that must be addressed.

The Russ Report found that:

As with the previous year, both the vacancy rate and the turnaround time show a negative trend for 2005. Russ Report p. 1.

* * *

For the entire year vacancy rates exceeded HUD's allowable three percent, averaging 4.78 percent per month. This is a serious problem and creates additional problems for future receipt of operating subsidy (described below). In addition, the year has seen substantial increases in turnaround time, the number of days between the last day of occupancy of a resident move-out and the earlier of the next lease date or first date of new occupancy. In only one month, March, did the average number of turnaround days drop below 100 days. On average, every unit was vacant for 135.80 days before being re-leased during 2005. To summarize, every vacant unit is out of service for more than four months before being reoccupied. Russ Report, p. 2. (emphasis added throughout).

Finally the number of units vacant for more than one year doubled during 2005, from 14.33 units to 28.17 units. . . . This indicator is quite inexplicable and disturbing. Further, it cannot be permitted to continue. Russ Report, p. 2.

These trends, if allowed to continue, will reduce the NHA funding and operating subsidy, and the NHA's consequent ability to provide low-income housing. As noted by Ms. Russ: "(t)hese trends are disquieting for a variety of reasons:"

2. Vacant units are targets for vandalism and criminal activity, which, in fact, is in

evidence at a couple of properties. Russ Report, p. 2.

3. HUD's new model for funding public housing operating subsidy significantly reduces the amount of money PHAs will receive for vacant units; in the past HUD's subsidy for "allowable vacancies" included an imputed amount of rent. The new model provides only the subsidy. Further, PHAs do not earn "management fees" on vacant units; (Russ Report, p. 2)

4. Besides reduced funding for allowable vacancies, HUD will not be providing funding for the majority of vacant units at all; the amount of money available in any future year will be limited to the number of unit-months under lease in the previous year. This is going to hamstring NHA in a very painful way. Russ Report, p. 2. (emphasis added)

Further, Ms. Russ stated:

It is essential to resolve NHA's underlying property management problems as soon as possible. Continuing the current course will result in less and less operating subsidy to the agency and, most importantly, will result in seriously substandard living conditions for residents and limited new housing opportunities for housing applicants. Russ Report, p. 3, par. 3 (emphasis added)

In an effort to get to the bottom of the vacancy trends Ms. Russ conducted site visits at the NHA. Russ Report, p. 2. She found that some projects were poorly managed and not in acceptable condition. Russ Report, pp. 2-3.

The disparity in condition between NHA's properties is not based on the age or type of properties - there are poorly managed town

home developments and well managed conventional "projects". The difference is simple - some properties are well managed and some are poorly managed. . . .²

Ms. Russ further found that there was a failure of the leasing and occupancy department.

Another aspect of operations that is hindering unit turnaround times is the leasing time. The Occupancy Department is not processing applicants quickly enough, leading to vacancies in ready units. According to Mr. Brown, the problem is exacerbated by the fact that there is no strong leader heading the department who is willing to enforce performance standards. Russ Report, p. 3, par. 2.

An added problem, according to Ms. Russ, is that:

NHA is a so-called "stop loss" housing authority under the new Operating subsidy formula. This means that the authority is scheduled to receive substantially less operating subsidy, with reductions in each of the next four years unless HUD recognizes NHA as having successfully made the transition to "asset management". This is not an easy task. Russ Report, p. 3, par. 4. (emphasis added throughout)

² "Dwight Brown, who has overall responsibility for property management, has not been successful in enforcing performance standards among his housing managers, despite his best efforts. The people he has hired are effective managers and their properties are in good condition. This is also true of some of the managers who were hired before Mr. Brown. Unfortunately, there are also staff working in property management who are not performing adequately despite disciplinary actions by Mr. Brown." Russ Report, pp. 2-3. (Mr. Brown is no longer with the NHA.)

The NHA has violated the Court order to expeditiously . . . rent vacant units, (order of the Court, dated May 25, 1999, Section V.B.1.b., p. 7, par.2), and to meet and maintain the acceptable HUD vacancy rate allowance of 3%, Russ Report, p.2 and standard vacancy turnaround time of 30 days (5/25/99 Court Opinion at p. 18).

C. The Section 8 Housing Choice Voucher Program.

The Russ Report found that . . . :

The HUD Management Review issued at the beginning of April found the Housing Choice Voucher Program to be troubled. . . . At that time the program is understaffed, from the administrative level down. Once again, efforts were underway to hire an assistant director. Russ Report, p. 4, Section 2, par. 1.

* * *

Timely reports were not received for the entire year. During the period when the Section 8 Director was on sick leave, no reports were received. . . . Russ Report, p. 4, para. 1, and 4.

The Urgent Need for Relief by this Court.

There is an urgent need for the Court to grant relief and to monitor the situation so that the NHA improves performance, does not lose operating subsidy, and so that housing is provided to low income people. The warnings and recommendations in the Russ report should be heeded, and

her expertise would be extremely helpful in reversing the current state of affairs.

D. Relief Sought.

Plaintiffs urge this Court to:

1. order the NHA to report to the Court on its actions, if any, in response to the Russ Report.

2. order that Ms. Russ evaluate those steps, if any, and report to the Court.

3. order that the NHA improve and maintain conditions at all projects at an acceptable habitable level, so that leasing is not hindered or slowed by a failure of conditions;

4. order the NHA to improve performance so that the vacancy rate is kept under the HUD acceptable level of 3% and the vacancy turnaround time is kept to the accepted standard of 30 days;

5. order that a merit based search process be developed to appoint qualified effective managers at the poorly managed project and a highly qualified and effective leader to head the leasing and occupancy department;

6. given that asset management is currently mandated, order that the NHA work with HUD, the Court appointed expert, community groups, and plaintiffs, to

assure that it successfully implements asset management with the goal of preserving all the public housing units;

8. order that the Housing Choice Voucher Program be adequately staffed.

9. order that, in light of the troubling trend of backsliding in benchmarks of management performance in the past 2-3 years, these aspects of the NHA's operations be monitored more regularly by Ms. Russ with more frequent reports to the Court every three months, including a report on the status of the NHA funding.

POINT III

THE NHA IMPROPERLY DIVERTED \$1.5 IN CONSTRUCTION FUNDS FROM THE FUNDS SET ASIDE TO DEVELOP THE 1777 UNITS UNDER THE SETTLEMENT AGREEMENT IN VIOLATION OF ITS REPRESENTATION TO THE COURT AND TO THE PARTIES.

A. Background - In 2,000 The NHA, In Response to and During Litigation, Set Aside Funds to Cover Construction Shortfalls, and Represented to the Court That the Funds would be used for the 1777 units covered by the Settlement Agreement.

In December, 2000, plaintiffs moved for relief (including the appointment of a construction receiver), regarding the construction of the remaining housing under the Settlement Agreement. This included relief with respect

to two of the remaining uncompleted projects, NJ 2-49 and 2-53. ~~plaintiffs pointed out that, due to the substantial delays in the construction of housing over the years, that inflation had sapped the available funds necessary for the construction.~~ HUD had reserved the construction funds in 1991, and by 2000 the NHA had a construction shortfall of \$16,829,658 for the remaining projects. The shortfall was the difference between the HUD reservation of funds in 1991, and the applicable 2000 Total Development Cost guidelines. (TDCs)³

In response to plaintiffs' motion, the NHA, on ~~December 15, 2000, requested HUD to approve \$16,829,658 to cover the construction shortfall by bringing construction allocations up to the level of the HUD Total Cost Development Guidelines. Three days later on December 18, 2000, HUD approved the request. HUD stated:~~

This office has reviewed your request, along with the Board Resolution and your schedule which identifies the programs and the amounts, totaling \$16,829,658, which are being requested to be reprogrammed to the Public Housing Development projects NJ02 045, 047, 048, 049, 050, and 053.

The Newark Office hereby approves the reprogramming of these funds. (Exhibit 1) (emphasis added)

³ The Total Development Cost Guidelines are national standards, which vary from area to area depending on housing costs, and which set forth how much it costs to build a unit of housing in Newark. (See Exhibits 8 and 9)

The NHA and HUD obtained the 16.8 million from the NHA's Section 8 operating administrative fee reserves. See HUD Audit (Exhibit 2, p.102).⁴ To effectuate this, the NHA passed Resolution "00-12 2 8, which authorized the use of \$16,829,658 of Section 8 administrative fee reserve funds for the construction of 528 townhouse units required by court order to be built by the NHA." Ibid.⁵ The NHA resolution (00-12-2-8) stated in part:

WHEREAS, an analysis of the funds available in the various reservations of HUD for Projects NJ 2 45,47, 48, 49, 50 and 53, consisting of 528 units, has determined that there may be a shortfall between the HUD reservation of funds for the Projects and the Authority's best estimate of the cost of development which is \$16,829,658; and

WHEREAS, it is necessary that the Authority provide assurance to the Court that it has the necessary funds available to cover said shortfall in the amounts required for the contracts with Developers for the subject Projects; and . . . (emphasis added)

⁴ The full title of this document is Newark Housing Authority, Newark, New Jersey NJ 002, Review Reports (Limited Management Review: Public Housing and Section 8 Programs; Confirmatory Review: Section 8 Management Assessment Program (SEMAP) Certification 3/31/2004; Certification Review: Public Housing Assessment System (PHAS) Certification 3/31/2004; Financial Review; Procurement Review) It appears to be a preliminary, and not a final audit.

⁵ See Exhibit 2, p. 102

* * *

NOW, THEREFORE, BE IT RESOLVED BY THE BOARD OF COMMISSIONERS OF THE HOUSING AUTHORITY OF THE CITY OF NEWARK:

1. That the Authority hereby resolved \$16,829,658 to cover the projected shortfall in funding for Projects NJ 2 45, 47, 48, 49, 50 and 53, consisting of 528 units; and
2. That the Executive Director and the Assistant Executive Director for Finance, Planning and Administration are directed to take such actions as are necessary to effectuate the foregoing and provide assurances to the Court in the form of certifications as recommended by the General Counsel; (Exhibit 3) (emphasis added)

The NHA filed this resolution with the Court as part of its opposition to plaintiffs' 2000 application for relief with respect to the construction of the remaining units.⁶ ~~In accordance with the NHA resolution the NHA sought to assure the Court that the funds (\$16,829,658) would be used to cover the construction shortfalls.~~ See Certification of Executive Director, Robert Graham, dated December 18, 2000, filed in opposition to plaintiffs'

⁶ NHA Brief in Opposition to Plaintiffs' Motion for Relief with Respect to the Columbus Homes Replacement Program, Ex. 4 to the brief.

application.⁷ Similarly there were repeated NHA assurances in the NHA's brief in opposition to plaintiffs' motion.⁸

⁷ The certification states in part:

The Authority recognizes the potential need for additional funds to move several projects forward. To that end, the Authority has, subject to HUD approval, identified approximately \$16.8 million in funding to be used to cover any increases in development costs for the Authority's remaining construction projects. (Exhibit 18 to this brief, Certification of Robert Graham, dated December 18, 2000, pp.1-2, par. 5.)

⁸ The NHA's Brief in Opposition to Plaintiffs' Motion for Relief With Respect to the Columbus Homes Replacement Program, December 18, 2000, stated in part:

HUD has now allowed the Authority to reserve approximately \$16.8 million to address construction shortfalls. (NHA Brief, p.3, paragraph 1)

* * *

This . . . availability of funds from the December 12, 2000 resolution reserving \$16,829,658 (reflecting the shortfall between the HUD reserve for the remaining projects and the maximum allowable expenditures under the HUD regulations) will expedite the development of all remaining units to be developed under the Settlement Agreement. (NHA Brief, p.15, paragraph 2)

* * *

Notwithstanding the Authority's position, a decision has been made to communicate with the aforesaid developers and attempt to negotiate a price increase more in line with today's development costs. As set forth in Bianco's certification, new cost proposals have been

B. Contrary to These Assurances That the Funds Would be Used For the 1777 Units Covered By the Settlement Agreement, the NHA Diverted \$1.5 Million in Funds For "Security Costs."

Contrary to these assurances, however, the NHA did not use this money for townhouse construction as it represented to the Court, to HUD, and to the parties that it would.

According to the HUD Audit,⁹ the NHA, in March, 2003, authorized the use of \$1,474,170 of the funds that had been reserved to cover the construction shortfalls, to be used for security costs. See Ex. 2, pp. 101-102, entitled "Section 8 Reserves used for Low Income Housing Program Security." The HUD Audit states that the NHA Board resolution authorizing this diversion of funds had referenced the (2000) NHA resolution, (00-12-2-8, Exhibit 3) "which authorized the use of \$16,829,658 of Section 8 administrative fee reserve funds for the construction of 528 townhouse units required by court order to be built by the NHA."¹⁰ In short, the NHA diverted construction funds

requested from the aforesaid developers in anticipation of receiving approval to reserve the aforesaid \$16.8 million in increased funding. (NHA Brief, p.20, paragraph 2)

⁹ See n. 4 supra.

¹⁰ Exhibit 2, p. 102.

(\$1.5 million) to other purposes. These funds are now needed for current construction. See Point IV infra.

Although the NHA had represented to the Court that these construction shortfall funds (\$16,829,658) would be used for the construction of townhouses under the Settlement Agreement, counsel is unaware of any NHA notice to the Court seeking permission for the diversion of funds.

C. Relief Sought.

Wherefore plaintiffs pray that this Court order that:

1. the NHA restore the diverted \$1.5 million to be used for the construction of NJ 2-49 and NJ 2-53.

POINT IV

THE NHA IS IN THE PROCESS OF DEVELOPING CONSTRUCTION PROJECTS AT EXPENDITURES SUBSTANTIALLY BELOW THE HUD STANDARD TOTAL COST DEVELOPMENT GUIDELINES, WHICH THREATENS THE QUALITY OF THE HOUSING. THERE IS DOUBT AS TO WHETHER THE REQUIRED PROJECTS WILL BE BUILT AT ALL.

A. N.J. 2-49 and 2-53 are underfunded as they are being developed or constructed below the HUD Total Cost Development Guidelines.

1. ~~NJ 49 is substantially underfunded.~~ In March, 2003, the NHA approved a construction proposal with the Tony Gomes Construction Company for NJ 2-49 for \$14,055,000. According to the latest NHA construction report, dated October 18, 2006, the NHA has de-designated Tony

Gomes Construction Company. This means that the NHA must begin solicitation of a new developer all over again. (Ex. 25, pp. 1-2) The NHA stated that it would solicit bids on November 2, 2006. This is occurring over 3 1/2 years since the initial proposal approval of Tony Gomes in March, 2003.

Since March, 2003, however, the cost of construction has substantially increased, and the approved proposal price in March 2003, \$14,055,000, is substantially below the HUD 2006 Total Development Cost Guidelines.

According to the 2006 HUD Total Cost Guidelines, the cost of construction for Row Houses in Newark for NJ2-49 is \$18,118,727.¹¹ This is \$4,063,727 above the approved proposal price in March, 2003 of \$14,055,000, and in addition, is a 22% increase in the cost of construction since March, 2003.

Indeed a substantial construction shortfall (\$1,181,239) existed at the time the NHA approved a proposal for Tony Gomes for NJ 2 49 in March, 2003.¹² In

¹¹. The 2006 Total Cost Development Guidelines are at Exhibit 9. The calculations for the cost of construction for 2-49 are the total of 18 1 BR units times the cost of construction of a 1 BR unit in 2006 of \$153,994; (\$2,771,892); plus 55 2 BR units times the cost of a 2 BR unit in 2006, \$199,127, (\$6,969,445); plus 35 3 BR units times the cost of a 3BR unit in 2006, \$239,354, (\$8,377,390). See Ex. 9, p.2; See Exhibit 19 for the bedroom sizes of NJ2-49.

addition to the shortfall the NHA appeared to cut corners on construction of NJ 2-49 from the start.¹³

NJ 2-49 is a project of 88 units - the exact same size as a recently completed project, NJ 2-50, which also contained 88 units. In addition both projects have the same bedroom configuration.¹⁴ Both projects, therefore, should have cost the same to construct. Yet NJ 2 50 was only \$603, 239 below the TDCs,¹⁵ (still a substantial amount), as

¹³ The NHA approved a construction proposal of Tony Gomes Construction Company for NJ 2-49 in the amount of \$14,055,000. (Ex. 5, p.2) The 2003 TDC for the project is \$15,236,239. The shortfall between this 2003 TDC, and the approved proposal is \$1,181,239. (\$15,236,239 (2003 TDC) - \$14,055,000 (Turnkey contract price) = \$1,181,239) (shortfall).

¹⁴ . On January 22, 2004, less than one year after the NHA diverted the funds from the construction of housing in March, 2003, the NHA approved a construction proposal of Tony Gomes Construction for NJ 2-49. (Ex. 5) A recital in the resolution states:

"WHEREAS, the Authority is selecting the lowest price proposal to affect cost savings and in the interest of economy and efficiency in light of the budgetary constraints that have impacted the Authority; and . . . " (emphasis added) (Exhibit 5, p. 1).

Had the NHA not diverted the \$1.5 million, the "budgetary constraints," the need for "cost savings," and the need for "economy," would not have been as severe, and the NHA would have been able to build housing closer to the Total Development Cost guidelines.

¹⁴ Compare Ex. 19, p. 1 with Ex. 20, p.1.

¹⁵ The Turnkey contract price for NJ 2-50 is \$14,633,000. (Ex. 21, p.1) The 2003 TDC is \$15,236,239. (Ex.8, p.3).

opposed to NJ 2-49, which is \$4,063,727 below the applicable 2006 TDCs.

To put the existing construction shortfalls into further perspective, it is instructive to compare them with NJ 2-47, a completed project. There, the Turnkey Contract price for NJ 2-47 exceeded the 2003 TDCs.¹⁶

The NHA practice has been to construct housing at the Total Cost Development Guidelines.¹⁷ The substantial underfunding of NJ 2 49 and NJ 2 53 violates that practice, and the goal of safe, decent and quality public housing and housing for the long term.

2. NJ 2-53 is also substantially underfunded
under the TDCs

This project is 56 units. (Ex. 25) The contract price is \$8,780,000. (Ex. 22, p.1) The 2003 TDC for the project is \$9,259,502. (Ex. 9) The shortfall below the 2003 TDC is

The shortfall from the 2003 TDC is \$603,239. (\$15, 236,239 (2003 TDC) - \$14,633,000 (Turnkey Contract price) = \$603,239. (shortfall)

¹⁶ The Turnkey contract price for NJ 2-47 was \$17,538,908. (Ex. 10, p.1) The contract price is \$199,748 more than the TDC. The TDC was \$17,339,160. (Ex.8, p.3). [\$17,538,908, (Turnkey contract price) - (\$17,339,908 (2003 TDC) = \$199,748. (amount over TDC)]

¹⁷ See pp. 9-11 supra; n. 15 and accompanying text, p. 18. The NHA requested and received \$16,629,258 to make up for the shortfalls below the TDCs. See also for example, Exhibit 7, pp. 2, 3-4.

\$479,502. [\$9,259,502 (2003 TDC) - \$8,780,000 (Turnkey Contract price) = \$479,502 (shortfall)]

The contract price for NJ2-53 is \$2,237,672 below the 2006 TDCs.¹⁸ The latest construction report provides only a skimpy detail of the status of NJ 2-53. ("The Authority is taking proactive steps to move this development along.") (Ex.25)

In short the NHA is constructing housing below HUD's standards as to what it would cost to build quality public housing in Newark. ~~At the Court hearing on January 23,~~

~~2006, the NHA conceded that the then three remaining projects were below the Total Development Cost Guidelines.~~

B. Underfunded Housing Will Undoubtedly Lead to Inferior Construction as Developers and the NHA will seek to cut corners. Indeed, there is Doubt As to Whether the Housing Will be Built at All.

¹⁸See Exhibit 22, p.4, Exhibit F to Turnkey contract, and multiply the bedroom sizes times the construction costs. (19 1 Bedroom units x \$153,994 (\$2,925,886); 19 2 BR units times \$199,127 \$3,783,413; 18 3BR x \$239,354 (\$4,308,372) The total construction costs for the 2006 TDCs is \$11,017,672. The shortfall below the 2006 TDCs is \$2,237,672. (\$11,017,672 (2006 TDC) - \$8,780,000, (turnkey contract price) = \$2,237,672 (shortfall).

The NJ 2 53 turnkey contract was entered into in November 2004. (See Exhibit 22) It is now 2 years later. The contract set a completion date of December 31, 2005, and it is now almost a year since that. Winter is arriving and this will further slow construction.

Underfunded construction is extremely worrisome and will likely lead to inferior housing. For example, in 2004, approximately 2 years ago, the NHA completed townhouses on the site of Kretchmer Homes, part of the Walsh Homes Hope VI program. According to the Newark Star Ledger, February 5, 2006, when Nancy Crespo, President of the Kretchmer Homes Tenants' Association took over the keys to her new townhouse at the Kretchmer Homes site, she "thought the development would be a shining light of the city." (Exhibit 12, p.1) "Since that day in 2004, 'it's been hell,'" she said. The Newark Star Ledger further reported that:

Water collects in crawl spaces, causing mildew. Floor tiles are coming up, ceilings leak and toilets have clogged from bad plumbing. After trying for more than a year to get help from the Newark Housing Authority for herself and other residents at the complex with no results, Crespo resigned as tenant president. (Exhibit 12)

Crespo said she "blames the Newark Housing Authority management for failing the tenants and said the agency needs a total overhaul in how it's managed and operated." ibid. Upon information and belief Tony Gomes Construction Company had some responsibility for this project.

As stated by former NHA General Counsel Frank Armour in a motion to compel HUD to provide funding in accordance

with the TDCs, inadequate funding would lead to inferior housing. (Ex. 24, pp. 2-3) Mr. Armour stated:

We believe that this Court has the authority and an obligation to enter such an order so as to facilitate the Authority's compliance with the Settlement Agreement and subsequent Court Orders. To require the Authority to develop housing without sufficient funding from HUD violates both the letter and the spirit of the Court's Order. The increased costs are a result of inflation and HUD's recognition that its prior development cost limitations did not truly reflect the real cost of constructing substantial and durable housing for low income families. Ex. 24, p.2)

~~It is also worrisome that Tony Gomez, Assistant Vice President of the company, which has been de-designated from NY 2-49, is constructing 2-53.~~

In addition to obvious doubts as to the quality of the construction, there are doubts as to whether the construction will be completed.

Plaintiffs are aware of at least four NHA projects which are incomplete:

1. NY 2-49;
2. NY 2-53;¹⁹

¹⁹ Construction has started on this project. See Exhibit 25. The construction report dated July, 2006 stated that various phases of the project are 45% to 80% complete, and that construction is scheduled to be completed by the summer of 2006. (Ex. 16) Plaintiffs have questioned the accuracy of NHA construction reports. See pp. 23-25 *infra*;

3. the replacement for the Mt. Pleasant Estates;
NJ2-51
4. The Walsh Homes, HOPE VI project.³⁰

For example, at the court hearing on May 3, 2005, a year and 1/2 ago, the following occurred according to the Star Ledger,

The Newark housing Authority's attorney said yesterday the agency is trying to get rid of a politically connected developer who has failed to complete three low income housing projects, including one that was criticized in a federal audit as being severely delayed. (emphasis added)

* * *

"He's been in violation of the contracts for some time now, and it goes on and on" Debovoise said.

* * *

Lofton said the authority wants to negotiate to buy out Gomes and bring in another developer, rather than removing Gomes, which could lead to a long legal entanglement that would delay the project further.

* * *

Debovoise raised questions about a \$14 million contract to build 88 units of housing in the South and West wards and an \$8.7 million contract to build 56 units on Elizabeth Avenue. (Exhibit 13 pp. 1-2.)

³⁰ (Exhibit 15; Exhibit 13, p. 2, pars. 2, 3, and 4. See pp. 22-23 infra. The Walsh Homes project is not covered by the Settlement Agreements.

For another example of an incomplete project, at the Court hearing on January 23, 2006, ~~the NHA stated that 75 units of Walsh Homes replacement had not been built even though the NHA received money for them thirteen years ago.~~²¹ As stated by the Stax Ledger:

Gomes' other project with the authority is Walsh Homes South, 75 units of townhouses for \$12.56 million near Grafton Avenue in the North Ward. The federal Department of Housing and Urban Development cited the project as having missed six important deadlines and as being "fraught with delays." (Ex. 13, p.2)

In addition the construction in this case drags endlessly on as this is beyond the 17th anniversary of this litigation (filed 1/89), and more than 18 years after the NHA received funding for the replacement of Columbus Homes. It is hard to believe

Moreover the NHA construction reports have been seriously inaccurate. In its October 15, 2005 construction report, the NHA stated, with respect to NJ2 49, that "a construction start is scheduled for approximately Spring 2006."²² The exact same construction report was filed on

²¹ . In 1993 HUD awarded the NHA a HOPE VI grant for Walsh Homes. In 1995 the HOPE VI plan was changed to new construction. Approximately 9 years later, as of March 31, 2004, the construction had not been completed, and there were potential impairments in four of the six projects HUD Audit, p. 76 (Exhibit 15)

²² The NHA's identical October 15, 2005 and January 15, 2006 construction reports state:

January 15, 2006. Just eight days later, however, in the Court hearing on January 23, the NHA announced that NJ 2-49 was stalled, that it involved litigation, and that the matter had to be discussed in camera.²³

With respect to NJ 2-49, the latest construction reports, April 15, and July 15, 2006, are virtually

Project NJ 2 49; Tony Gomes Construction Company

This project consists of 88 units and a community building to be built on South Twelfth Street, Peshine Avenue, Jelliff Avenue, Hunterdon Street, and Clinton Avenue in the Lower Clinton Hill Area. Tony Gomes Construction was designed as the developer on January 22, 2004. HUD PHA comments were received on August 26, 2004. Tony Gomes Construction has received from HUD PHA project proposal approval on June 7, 2005. The next steps are to prepare construction documents (plans and specifications), Newark Planning Board approval and a Turnkey contract. A construction start is scheduled for approximately Spring 2006. (emphasis added) (Ex. 14)

²³ The selection of Tony Gomes Construction Company for NJ 2-49 is also disconcerting. According to Newark Star Ledger, the consulting firm of Barbera and Barbera, which routinely examines bids for the NHA, expressed reservations about Gomes' ability to do the job. At the time, according to the Ledger, the company had yet to finish any project it had started. Barbera stated: "I would prefer to see them successfully complete at least one project that has been awarded to them before they receive another one." The firm also expressed reservations about Gomes' ability to finance the project. Gomes was awarded the project over Claremont Construction, whose bid was rated superior, and who had completed three authority projects. Barbera described Claremont as "liquid, well managed and capitalized very well." See Newark Star Ledger January 2, 2005, p. 11; See also Ex. 13, pp. 2-3.

identical to the reports of October 15, 2005, and January 2006. They reiterate a statement made in the October 2005 report and January 26 reports, that "(t)he next steps are to prepare-construction documents (plans and specifications), Newark Planning Board approval and a Turnkey Contract." (See. Ex. 14) They contain a new sentence: "(m)eetings have been held with the Developers Architect and Site Engineers to finalize the preparation of plans and specifications." (Ex. 16). With respect to NJ 2-49, the construction reports of April 15 and July 15, 2006 are identical.

Now, after all this, and after projecting a construction start in the spring of 2006, the developer Tony Gomes has been de-designated, and the bidding process to select a new developer has to begin all over again. ~~This is 1 1/2 years after the turnkey contract was entered in March, 2003, with Tony Gomes.~~

The Urgent Need for Relief by this Court.

This construction has dragged on and on. The construction for NJ 2-49 has been seriously delayed, and, with the de-designation of Tony Gomes, the bidding process for that project has to start all over again. If the NHA

does not complete the housing, this Court may well be without a remedy.²⁴

Second the construction is seriously underfunded, and this Court should not preside over the construction of shoddy housing that will fall apart virtually as soon as it has been built. This is housing that has to last a long time. See the immediate construction failures of the Walsh Homes Hope VI Housing Replacement project, pp. 20-21 supra.

~~Therefore this Court should order:~~

1. ~~that the \$1.5 million diverted from~~
~~construction to security costs be restored to fund the~~
~~remaining construction.~~ See Point III supra.

2. that the money allocated for NJ 2-49 be
~~increased at least to \$1,083,927,~~ so that NJ 2-49 will be
built at the level of the current 2006 Total Cost
Development Guidelines.

3. that the money allocated to NJ 2-53 be
~~increased at least to \$1,137,072~~ so that construction can
occur at least in accordance with the current 2006 Total
Cost Development Guidelines;

4. that the funds sought in Nos. 2 and 3 above be

²⁴ See the Walsh Homes Hope VI HOPE VI replacement housing failure, n.20 and accompanying text, supra.

increased to the 2007 Total Cost Development Guidelines if appropriate funding in accordance with the 2006 TDCs has not been allocated;

5. that the \$1.5 million and any other funds available for the construction of housing be placed in escrow to protect them from further diversion to other uses;

6. ~~that a housing construction receiver be appointed by the Court, to construct the unfinished housing.~~

SUMMARY AND RECAPITULATION OF OTHER RELIEF SOUGHT IN THIS MOTION

With respect to the Mt. Pleasant Estates as discussed in Point I, supra, plaintiffs urge that this court:

7. hold the NHA in contempt of court for failing to comply with the Court order of January 21, 2005;

8. order the NHA to develop a plan to construct the full 1,777 replacement units in the settlement agreement including 42 that reflect the loss of units to homeownership at Mt. Pleasant;

9. award attorneys fees and costs for litigating this issue.

With respect to the vacancies and turnaround time

deficiencies, as set forth in the Russ Report, see Point II supra, plaintiffs urge that this Court:

10. ~~order the NHA to report to the Court on its actions, if any, in response to the 2006 Russ Report;~~

11. order that Ms. Russ evaluate those steps, if any, and report to the Court;

12. improve and maintain conditions at all projects to an acceptable habitable level, so that leasing is not hindered or slowed by unacceptable conditions;

13. improve performance so that the vacancy rate is kept under the HUD acceptable level of 3% and that vacancy turnaround time is brought within the 30-day standard;

14. order a merit based search process, designed to appoint qualified effective managers at the poorly managed projects and a highly qualified and effective leader to head the leasing and occupancy department;

15. order that the Housing Choice Voucher Program be adequately staffed;

16. order that, in light of the documented backsliding in the NHA's management performance in these areas in the past 2-3 years, this relief and the vacancies and turnaround deficiencies be monitored more regularly by

Ms. Russ with reports to the Court at least every three months.



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November 15, 2006

CERTIFICATE OF SERVICE

I hereby certify that a copy of the of the foregoing Brief and appendix has been sent via mail on this day, the 16th day of November, 2006, addressed as follows:

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